Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Examination of Current Policy	)	GC Docket No. 96-55
Concerning the Treatment of	)	
Confidential Information	)	
Submitted to the Commission	)	
	)	

COMMENTS OF GENERAL COMMUNICATION, INC.

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SUMMARY

Disclosure of information pursuant to an administrative proceeding is essential to the successful functioning of administrative law. For that reason, agencies are required by the Freedom of Information Act to make information in their possession available to requesting parties. Information should be withheld only under limited exemptions as provided by FOIA. Requirements of the Administrative Procedure Act and public policy interests mandate that information be freely available for public review.

The Critical Mass distinction between "required" and "voluntary" information should be made according to the circumstances of the information submission. Any information submitted in the course of an agency proceeding in which the submitter seeks agency action should be deemed "required." This same standard should apply to agency rules affording parties special treatment with respect to information "voluntarily" submitted.

Finally, protective orders can be used effectively to balance the interests of disclosure and confidentiality. The protective order should be tailored according to the circumstances of the proceeding. However, protective orders should not be employed as a replacement for an agency's obligations to disclose information under FOIA.

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COMMENTS

General Communication, Inc. ("GCI"), pursuant to Section 1.415 of the Commission's Rules,[1] hereby submits its Comments in the above-referenced proceeding.[2]

I. INTRODUCTION

The Freedom of Information Act ("FOIA") requires that federal agencies make information in their possession publicly available.[3] For this reason, disclosure of requested material properly is denied only under limited exceptions identified in the Act.[4] An agency implementing the FOIA provisions must seek to grant FOIA requests generally, and grant with restrictions or

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1. 47 C.F.R. § 1.415.

2. Examination of Current Policy Concerning the Treatment of Confidential Information Submitted to the Commission, Notice of Inquiry and Notice of Proposed Rulemaking, GC Docket No. 96-55, FCC 96-109 (rel. March 25, 1996) ("NPRM").

3. See 5 U.S.C. § 552.

4. 5 U.S.C. § 552(b). GCI's Comments pertain to FOIA Exemption 4, which exempts from public disclosure "trade secrets and commercial or financial information obtained from any person and [that is] privileged or confidential." 5 U.S.C. § 552(b)(4).

deny only those requests that squarely fall within one of the FOIA exceptions.

This policy favoring disclosure is one that must be diligently upheld by the Commission's policies. Full disclosure of information submitted to the Commission — in accordance with the limited FOIA exceptions — achieves important results. Disclosure comports with the requirements under the Administrative Procedure Act that parties be given the opportunity to have meaningful participation in administrative proceedings by having access to the information upon which such decisions are based. Second, disclosure provides information to those parties who are involved in an administrative proceeding so that they can provide meaningful input for consideration by the Commission and staff.

For these reasons, the Commission should classify broadly submitted information that is "required" pursuant to an agency proceeding. Even where realistic concerns related to confidential treatment have been raised, release of information pursuant to a protective order can effectively balance the interests of disclosure and confidentiality.

II. PUBLIC POLICY FAVORS MAXIMUM AVAILABILITY OF INFORMATION.

Federal law and its underlying policies require that parties must be given a fair opportunity to participate meaningfully in proceedings before the Commission. Pursuant to the Administrative Procedure Act, agencies must make available

pertinent information relied upon in determining final rules. Indeed, the Commission asserts in the NPRM that "[p]ublic participation in Commission proceedings cannot be effective unless meaningful information is made available to interested persons."[5] Therefore, the Commission should pursue a policy that limits confidential treatment of information to those exemptions provided in FOIA.

A. The APA Requires An Opportunity for Meaningful Participation Based on Information Pertinent to an Agency Decision.

Agencies must give interested parties "an opportunity to participate in [a] rule making through submission of written data, views, or arguments."[6] Courts have determined that a public record is critical to meaningful participation in a rulemaking, and therefore, parties must be apprised of the information upon which an agency's decision or proposal is based.[7] This requirement cannot be fulfilled when critical information upon which an agency decision is based is withheld.

In Portland Cement Association v. Ruckelshaus,[8] the court determined that the parties were not adequately informed of the basis upon which the Environmental Protection Agency established standards under the Clean Air Act. The court found "a critical

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5. NPRM at ¶ 31.

6. 5 U.S.C. § 553(c).

7. See Kenneth Culp Davis, Administrative Law Treatise, § 7.3 306 (1994).

8. 486 F.2d 375 (1973), cert. denied, 417 U.S. 921 (1974), reh'g denied, 423 U.S. 1092 (1976).

defect in the decision-making process in arriving at the standard . . . in the initial inability of petitioners to obtain -- in timely fashion -- the test result and procedures used" in setting the final standards.[9] "It is not consonant with the purpose of a rule-making proceeding to promulgate rules on the basis of . . . data that, [to a] critical degree, is known only to the agency."[10] When information is withheld on the basis of a confidentiality claim, rules will be promulgated based on limited participation and input from interested parties. This outcome poses a real risk that agency policy will be based upon untested and one-sided arguments.

B. Interested Parties Can Offer Input That Is Beneficial to the Commission and Staff.

The regulatory requirements of the Telecommunications Act of 1996 have placed a strain on already stretched Commission resources. As the staff works to meet deadlines imposed by Congress for implementing the 1996 Act, reliable input from interested parties on a variety of matters will be essential. However, parties to a proceeding can provide useful input only if they are informed fully with respect to other submissions in a proceeding upon which the Commission or bureau will base a decision. Therefore, the Commission may find that a "compelling

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9. Id. at 392.

10. Id. at 393.

public interest" merits disclosure under a variety of circumstances.[11]

Indeed, GCI has presented this concept to the Commission with respect to its recent attempts pursuant to FOIA to obtain cost allocation plan and tariff information from AT&T/Alascom. GCI has been denied access to information that would allow it to participate meaningfully in the proceeding.[12] The Commission has determined that in certain areas of Alaska, facilities-based competition for long distance service is not permissible.[13] Therefore, GCI has no choice except to purchase monopoly service from Alascom, Inc. ("AT&T/Alascom"), a competitor owned by AT&T, pursuant to a tariff. This tariff is based on a cost allocation plan that distributes its costs among the bush (facilities-based competition prohibited) and non-bush (facilities-based competition allowed) areas. Astonishingly, this model is secret.

By performing tests based on limited information, GCI has been able to identify significant errors and inconsistencies in the results produced by AT&T/Alascom's cost allocation plan. However, the specific model and its inputs — that are required to

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11. See 47 C.F.R. § 0.457(d)(1); NPRM at ¶ 23.

12. GCI offers long-distance service throughout Alaska.

13. See Alascom, Inc. Tariff F.C.C. No. 11, CC Docket No. 95-182; Alascom, Inc. Cost Allocation Plan for Separation of Bush and Non-Bush Costs, 10 FCC Rcd 9823 (1995).

prove definitively GCI's objections to the CAP and tariff — have been withheld from GCI despite several FOIA requests.[14]

Even though GCI must offer its long distance service subject to the monopoly tariff, it has not been given the opportunity to demonstrate during investigation of the cost allocation plan and tariff the inaccuracies upon which it is based.[15] GCI is likely the only private party having the expertise and knowledge to analyze the AT&T/Alascom model in question, and its review of all pertinent material would be beneficial for a complete analysis of the CAP and tariff. Not only would the Commission have an additional analysis of the data provided by AT&T/Alascom, but GCI would also have the opportunity to participate meaningfully in a proceeding that will affect directly the unavoidable costs imposed upon it by AT&T in providing its service.

Parties who are adequately informed of information pertinent to a proceeding will be able to fashion more useful submissions for Commission consideration, particularly in this time of strained resources. Robust discussion of the issues leading to a well-reasoned outcome should be the goal in every proceeding. This goal will be frustrated if interested parties are denied the maximum access to information submitted to the Commission because

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14. In response to GCI's requests, AT&T/Alascom has made the ill-founded claim that the model is competitively sensitive.

15. Contrary to GCI's arguments, the Commission has found that the requested information is protected under FOIA Exemption 4. See, e.g., General Communication, Inc. on Request for Inspection of Records, FOIA Control No. 95-372 (rel. April 30, 1996); FOIA Control No. 95-403 (rel. March 4, 1996), petition for recon. pending.

of insincere use of FOIA exceptions by parties having exclusive access to information upon which they urge the Commission to take action that is detrimental to others.

III. THE COMMISSION SHOULD INTERPRET BROADLY INFORMATION REQUIRED PURSUANT TO A REGULATORY PROCEEDING.

The public policy benefits of dissemination of information in the Commission's possession cannot be achieved if FOIA exceptions and Commission rules are interpreted in such a way that denial of FOIA requests are permitted on a customary basis. The decision in Critical Mass Energy Project v. Nuclear Regulatory Commission[16] refined the definition of "confidential" set forth in National Parks and Conservation Association v. Morton.[17] According to the holding in Critical Mass, voluntarily submitted information that is customarily not be available to the public is deemed to be confidential. In relying on case law construing the language of FOIA Exemption 4,[18] the decision should not be read such that it effectively eviscerates FOIA disclosure obligations. "Voluntary" submissions are withheld pursuant to a less stringent standard than "required" submissions. However, as discussed below, submissions should be deemed as "required" from a party under a wide range of circumstances, especially where that party would have the

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16. 975 F.2d 871 (D.C. Cir. 1992), cert. denied, __ U.S. __, 113 S. Ct. 1579 (1993).

17. 498 F.2d 765 (D.C. Cir. 1974).

18. See NPRM at ¶ 17.

Commission take action detrimental to others based upon such untested information.

In addition, parties should not be permitted to use section 0.459(e) of the Commission's rules, which also turns on the "voluntary" submission distinction, to circumvent disclosure of documents. Commission analysis of whether documents meet the standard of this section should conform with analyses undertaken pursuant to Critical Mass.

A. Critical Mass Does Not Vanquish FOIA Policy Favoring Disclosure.

The Commission describes in its NPRM the applicable standard for whether commercial or financial information is "confidential" under FOIA exception 4.[19] While the traditional standard for "confidential" still stands,[20] the decision in Critical Mass introduced the distinction between voluntarily and involuntarily submitted materials.[21] This distinction places great significance on the definition of "voluntary" and "required" submissions in this context. GCI believes that a formal request from the Commission is not required for a submission to be classified as "required."

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19. NPRM at ¶¶ 5-7.

20. "Commercial or financial matter is 'confidential' . . . if disclosure of the information is likely . . . either . . . (1) to impair the Government's ability to obtain necessary information in the future; or (2) to cause substantial harm to the competitive position of the person from whom the information was obtained." National Parks, 498 F.2d at 770.

21. Critical Mass, 975 F.2d at 879.

The Commission has requested that commenters consider its confidentiality policies in a number of contexts.[22] The discussion of voluntary submissions appears to be pertinent with respect to each of the proceedings, as it is likely that additional information may be required at some point during the Commission's consideration. Therefore, information submitted in response to any request in these proceedings, whether the request is formal or informal, should be considered to be "required" for purposes of the Critical Mass analysis.

The Department of Justice ("DOJ") has issued guidelines for agencies to apply the Critical Mass distinction between required and voluntary documents.[23] According to DOJ, this distinction "should be drawn according to the circumstances of the information submission, rather than according to the submitter's participation in any underlying activity."[24] For example, while a contractor's choice to participate in a request for proposals is voluntary, "the pursuit of a federal contract necessarily involves the submission of information needed to meet the requirements of the procurement process."[25]

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22. NPRM at ¶¶ 38-53 (identifying Title III licensing proceedings, tariff proceedings, rulemaking proceedings, requests for special relief and waivers, formal complaints, audits, and surveys and studies).

23. FOIA Update, "The Critical Mass Distinction Under Exemption 4," U.S. Department of Justice, Spring 1993.

24. Id. at 3.

25. Id.

This analysis is consistent with National Parks and decisions issued after Critical Mass. In National Parks, the court classified submissions as required regardless of whether they are "supplied pursuant to statute, regulation, or some less formal mandate."[26] Basically, certain information is required in order to do business with the government or obtain a government benefit.[27] In National Parks, the information requested was a condition of the continued right to operate concessions in national parks.

"Fundamentally, federal agencies have broad legal authority to require the submission of information from those with whom they deal."[28] The "key question," according to DOJ, "is whether those who chose to participate in the activity have information-submission requirements placed on them as a lawful condition of their participation in . . . an agency's related administrative process."[29] If so, then the information is "required." Other examples of "required" information include price elements that have been submitted in a bid for a government contract[30] and

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26. National Parks, 498 F.2d at 770.

27. FOIA Update at 5.

28. Id.

29. Id.

30. McDonnell Douglas Corp. v. NASA, 895 F. Supp. 316 (D.D.C. 1995).

requested documents that were necessary to obtain agency approval for the transfer of a contract.[31]

According to the Department of Justice and decisions following Critical Mass, submissions should not be considered voluntary if they are made pursuant to an agency proceeding. The Critical Mass distinction between "required" and "voluntary" must be applied in reference to the proceeding itself, not the submitting party's voluntary appearance in the proceeding. "Required" submissions should be construed broadly and therefore be subject to the test articulated in National Parks.

B. Parties Should Not Be Permitted to Label Arbitrarily Submissions as "Voluntary."

Section 0.459 of the Commission's rules permits a person submitting materials to request confidential treatment of those materials. If the confidentiality request is denied, the person may request that the materials be returned. However, this treatment is available only if the materials have been submitted voluntarily.[32] The rule explains that "voluntarily" means "absent any direction by the Commission."[33]

Two policies should be followed to ensure that parties cannot hide behind the "voluntary" label. First, the Commission should adhere to the same broad concept of "required" submissions discussed above. To gain from the administrative process,

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31. Lykes Brothers Steamship Co., Inc. v. Peña, No. 92-2780-TFH, 1993 U.S. Dist. LEXIS 20279 (D.D.C. Sept. 2, 1993).

32. 47 U.S.C. § 0.459(e).

33. Id.

parties have to be responsive to an agency's request for information regarding the proceeding. Therefore, a broad interpretation of "required" submissions will reflect the reality that parties before the Commission generally treat requests — regardless of the formality — as requiring a response.

Second, consistent with the NPRM, the Commission should require specific information that substantiates a party's confidentiality claim.[34] The requirement for substantiating information may discourage frivolous requests and will provide the Commission with information that will aid in the evaluation of the confidentiality request.

The treatment accorded voluntary submissions must not be abused. Only those submissions that are volunteered to the Commission, i.e. "absent any direction from the Commission," fall within this category. Any submissions made during the course of a Commission proceeding should be presumed to be required. In addition, if confidentiality is requested, a party should be required to substantiate the request.

IV. PROTECTIVE ORDERS CAN BE USED TO BALANCE THE INTERESTS OF DISCLOSURE AND PRESERVING CONFIDENTIALITY.

The use of protective orders presents a compromise between full disclosure and confidential treatment. According to the Commission, "[p]rotective orders and agreements have the advantage of permitting release -- albeit on a limited basis --

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34. See NPRM at ¶ 57.

of more information than would be possible without them, given [its] obligations to protect trade secrets and commercial or financial information."[35] Use of protective orders in moderation such that they do not replace Commission decisions regarding disclosure, may result in the availability of information to limited parties and/or individuals. In entering into such a protective order, parties should not be required to adhere to a form protective order, though. Instead, parties should be permitted to propose language for a protective order tailored to the circumstances of the proceeding.

Release of materials pursuant to a protective order is not likely to reduce submitters' willingness to provide information voluntarily to the Commission. Protective orders should not be used to replace the Commission's FOIA obligations. Rather, protective orders should be used to make information available if that information raises legitimate concerns about confidential treatment. In this way, the protective order encourages disclosure ordered by the Commission without making the information publicly available.[36]

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35. NPRM at ¶ 31.

36. GCI has offered to review AT&T/Alascom CAP materials pursuant to a protective order. See, e.g., FOIA Control No. 95-403, GCI Application for Review, filed January 30, 1996.

V. CONCLUSION

For these reasons, GCI urges the Commission to adopt policies in this proceeding that will maximize the availability of information upon which the Commission sets policies and issues decisions.

Respectfully submitted,

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